ORIGINAL

IN THE SUPREME COURT OF OHIO

KEITH LAWRENCE, Plaintiff-Appellant	:	CASE NO. 2011-0621
vs.	:	On Appeal from the Mahoning County Court of Appeals, Seventh Appellate District Case No. 09 MA 189
CITY OF YOUNGSTOWN, Defendant- Appellee.	:	

REPLY BRIEF OF AMICUS CURIAE OHIO EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT KEITH LAWRENCE

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I. INTRODUCTION

Amicus curiae Ohio Employment Lawyers Association ("OELA") submits this reply brief for the limited purpose of responding to the Appellee City of Youngstown's allegations that OELA's initial brief misstated the factual record of this case. As explained below, OELA's brief accurately stated the record in all respects. The record, which contains no evidence that the City ever attempted to notify Appellant Keith Lawrence of its decision to terminate his employee, supports the argument of Lawrence and OELA that a "discharge" should not be deemed to occur until the employer both unequivocally terminates the employer-employee relationship and provides the employee with notice of this decision.

II. ARGUMENT

A substantial portion of OELA's brief in support of the Appellant focuses on the disruptive consequences that would result from upholding the decision of the lower court in this matter, which held that an employer could "discharge" an employee—starting the clock on the 90-day limitations period for notifying an employer of a potential workers' compensation retaliation claim under Ohio Revised Code Section 4123.90—without ever notifying the employee of his or her termination. These consequences include the prospect of employees who do not discover their own terminations until after the expiration of the statute of limitations, employers who secretly change their employees' compensation or benefits, and even employees who continue working until the next scheduled payday, unaware they have already been fired.

Instead of making any effort to rebut these scenarios, the Appellee's Merit Brief sidesteps the real-life consequences of its proposition of law by repeatedly accusing OELA of distorting the factual record of this case. The City's brief contains at least three separate accusations that OELA has misstated or mischaracterized the record. They are addressed in order, as follows:

A. **The City Falsely States:** ***"Lawrence's amicus entirely ignores Mayor Williams' issuance of the termination letter on January 9, 2007 (R.D. 16, Ex. 1, Appx. K) and instead wrongfully characterized the notice as 'an internal communication about his termination' Amicus brief at p. 10."*** **(Appellee's Brief, p. 36).**

This allegation addresses the issue at the core of this case. Lawrence argues that the statute of limitations should run from February 19, 2007, when he first learned of the decision to terminate him, while the City argues it should run from January 9, 2007, when it first made the decision. The sole factual support for the City's argument is a letter, addressed to Lawrence and dated January 9, 2007, attached as Appendix K to the Appellant's Merit Brief. The City claims in its brief that this letter was "mailed to Lawrence on January 9, 2007" (Appellee's Brief, p. 6), but there is no actual record evidence of that mailing. The copy of the letter in the record was sent only to the City's street department, where it was stamped with a date of January 18, 2007. (Appellant's Merit Brief, p. 9; Appx. K). There is no record evidence that the letter was ever mailed or otherwise directed to Lawrence until February 19, when he arrived at work expecting to be reinstated from his suspension, but was instead handed the letter. There is no deposition or affidavit testimony from anyone who mailed the letter or even ordered that it be mailed; nor is there any document showing that the letter was mailed to or received by Lawrence.

The lower court held that whether or not the letter was mailed has no bearing on Section 4123.90's limitations period, as the period runs from the date of "discharge," and the "discharge" occurred when the City decided to fire Lawrence, not when it informed him he was terminated. It concluded that the limitations period ran from January 9, 2007, when the mayor signed the letter that, according to the record, was addressed to Lawrence, but delivered only internally, to the City's streets department. *Lawrence v. City of Youngstown* (7th Dist.), 2011-Ohio-998, ¶ 33.

In the absence of any evidence that the letter was mailed to Lawrence, it was not a mischaracterization for OELA to label such a letter as an "internal communication." It is the

City, not OELA, that has mischaracterized the record by claiming without record support that the letter was mailed to Lawrence on January 9, 2007. If there was evidence of such a mailing, this would be an entirely different case, and the burden might reasonably be placed on Lawrence to explain why he did not receive a letter that was mailed to his address.

The City openly agrees with this concept of "constructive notice," but it goes too far in stating, "Youngstown certainly can demonstrate it made reasonable efforts to communicate its discharge decision to Lawrence by way of the written notice." (Appellee's Brief, p. 37). Perhaps the City is correct that it *can* demonstrate such efforts, but no such efforts are reflected in the record. Without proof of mailing, the City must rely solely on its argument that an employer can discharge an employee without ever even attempting to inform the employee of the decision. For the reasons stated previously by both Lawrence and OELA, this Court must reject that argument.

B. The City Falsely States: *"Lawrence's amicus also incorrectly implies that Youngstown never made a written record of the termination decision (see Amicus Brief at p. 10)."* (Appellee's Brief, p. 36).

The City next accuses OELA of falsely implying that the City never made a written record of its decision to terminate Lawrence. OELA made no such implication. The citation in the City's brief is to a scenario OELA used to demonstrate the consequences that logically flow from the lower court's holding. As OELA's brief states, the City did make a record of its decision to terminate Lawrence, in the form of the letter from the mayor, dated January 9, 2007, and received at the City's streets department nine days later. The brief asks the hypothetical question, what if there had been no such record? What about situations where the decision to terminate an employee does not need to be conveyed to a department head or a human resources officer? This would be the case, for instance, where a sole proprietor wrongfully fires his or her employee while the employee is on unpaid medical leave. Under the lower court's analysis, if

the owner does not make a written record of this decision, the employee's claim would accrue on whatever date the owner claims he or she decided, in his or her own mind, to discharge the employee. That did not occur here, since there was a written record of the termination decision, but it could easily occur in subsequent cases, and there is no limiting principle that would distinguish such cases from this one. The only way to avoid the accrual of claims based on the undisclosed thoughts of a single individual is to reverse the lower court's ruling and hold that an employee is not actually discharged until the employee is informed of the termination decision.

C. The City Falsely States: *"Lawrence's amicus even misstates the record when it declares that Lawrence was aware of no reason at all to pursue his claim until he learned of Youngstown's decision to terminate him. Amicus Brief at p. 7."* (Appellee's Brief, p. 36).

Finally, the City alleges that OELA "misstates the record" by noting that Lawrence was unaware of any reason to pursue his wrongful termination claim until he was informed of the City's decision to terminate him. But in fact, the City openly agrees with OELA that Lawrence was unaware of any reason to pursue his claim until after he learned of the termination decision. The City alleges a "misstatement" only to emphasize that Lawrence was not fully aware of the factual support for his claim until April 2007, when he first uncovered the City's direct admission that it had retaliated against him based on his workers' compensation history. The City claims that because there is no true "discovery rule" under Section 4123.90, Lawrence's time limit might have expired even if he had been promptly informed of the decision to fire him.

Putting aside the City's unwarranted, purely rhetorical accusation that OELA misstated the record, its underlying argument is meritless. The purpose of providing a limitations period instead of requiring an employee to file his or her claims immediately upon termination is to give the employee time to investigate the facts of the case and his or her legal rights. OELA's brief notes the importance of such investigation, stating, just after the sentence cited by the City, that

"Lawrence lacked the opportunity or incentive to *investigate or pursue* his claim until the City had made the decision to terminate him, unequivocally ended its employment relationship with him, and communicated its decision to him." (Amicus Brief, p. 7 (emphasis added)).

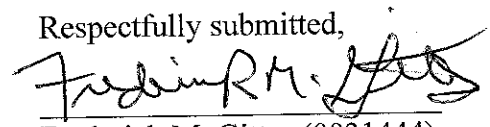
It was just such an investigation that led to Lawrence's discovery of the evidence supporting his claim. Lawrence filed a discrimination charge shortly after learning of the decision to fire him, and, as often occurs, this charge uncovered vital new information. His attorney quickly identified this information as evidence of a Section 4123.90 violation, and notice of this violation was given to the City within 90 days of the date Lawrence first learned of the termination decision. This is a textbook example of the system working as intended, so long as this Court grants Lawrence the benefit of the full 90-day period the General Assembly intended to provide in Section 4123.90. But the period the City urges, which was shortened by its own failure (purposeful or not) to convey its termination decision to Lawrence, was not sufficient to allow the investigation and consultation that led to Lawrence's claim.

While a true "discovery rule," where an employee who discovers previously unknown information giving rise to a claim could still pursue that claim, would certainly be preferable for employees, that is not the rule sought by OELA or Lawrence here. Instead, they merely ask this Court to apply the stated intent of the General Assembly in enacting Section 4123.90, which was to provide a terminated employee with 90 days in which to identify a potential retaliation claim and notify the employer. The General Assembly did not intend for an employer to be able to run down (or run out) the clock on an employee's claim before the employee even has a reason to inquire into the underlying facts or legal principles. This Court can prevent such an unintended consequence by holding that a discharge cannot occur until an employee has received notice of the employer's unequivocal decision to terminate his or her employment.

III. CONCLUSION

For the reasons stated above and in its initial brief, *amicus curiae* OELA urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2011, a copy of the foregoing Reply Brief of Amicus Curiae Ohio Employment Lawyers Association in Support of Appellant Keith Lawrence was served by postage-paid U.S. Mail upon the following:

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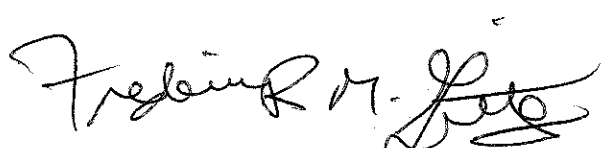

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